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CERTIFIED FOR PARTIAL PUBLICATION[1]

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. JAMES WILLIAM TURNER, Defendant and Appellant.	D033138 (Super. Ct. Nos. CR68452 & CR70527)

APPEAL from a judgment of the Superior Court of San Diego County, William D. Mudd, Judge. We affirm.

Lynne G. McGinnis for Defendant and Appellant.

Bill Lockyer, Attorney General, David P. Druliner, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Rhonda L. Cartwright-Ladendorf and Bradley L. Weinreb, Deputy Attorneys General, for Plaintiff and Respondent.

James William Turner appeals from a judgment after his second trial ordering his two-year commitment to the custody of the State Department of Mental Health (DMH) following a jury

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[1] Pursuant to California Rules of Court, rule 976.1, this opinion is certified for publication with the exception of parts II, III, IV and V.

finding he is a sexually violent predator (SVP) within the meaning of the Sexually Violent Predators Act (the Act) (Welf. & Inst. Code,[2] § 6600 et seq.). Turner contends the jury's determination should be set aside because the trial court should have granted his in limine motion to dismiss, there was insufficient evidence to show he suffers from emotional or volitional impairment, the court erred in admitting hearsay evidence of alleged "bad acts" other than that of the predicate offenses, the court erred in refusing to allow his daughter to testify and the version of CALJIC No. 4.19 given the jury impermissibly reduced the People's burden of proof.

In the published portion of this opinion, we shall determine that the trial court correctly denied a motion to dismiss the petition to declare Turner an SVP under the Act after a mistrial was declared following the first trial on the petition which resulted in a deadlocked jury. In the unpublished portions, we reject Turner's remaining contentions of error. Accordingly, we affirm the judgment.

BACKGROUND

Summary of the Act

Although our Supreme Court in *Hubbart* v. *Superior Court* (1999) 19 Cal.4th 1138 *(Hubbart)* has provided a thorough review of the statutory scheme comprising the Act (see *Hubbart, supra*

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[2] All statutory references are to the Welfare and Institutions Code unless otherwise specified.

at pp. 1143-1149), for the convenience of the reader, we repeat pertinent provisions relevant to the issues in this case.

The Act, which is contained in sections 6600 et seq., provides for the continued confinement in the custody of the DMH of those persons identified as SVPs before they have completed their prison or parole revocation terms. It defines an SVP as "a person who has been convicted of a sexually violent offense against two or more victims for which he or she received a determinate sentence[3] and who has a diagnosed mental disorder[4] that makes the person a danger to the health and safety of others in that it is likely that he or she will engage in sexually violent criminal behavior." (§ 6600, subd. (a).)

If the Department of Corrections (DOC) determines the inmate approaching sentence completion may be an SVP, it refers him or her for evaluation to see if the inmate falls under the

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3 "A 'sexually violent offense' refers to certain enumerated sex crimes 'committed by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person.' (§ 6600, subd. (b), citing Pen. Code, §§ 261, subd. (a)(2) [rape of nonspouse], . . . 264.1 [rape in concert], . . . 288a [oral copulation]. . . .)" (*Hubbart*, *supra*, 19 Cal.4th at p. 1145.)

4 Although a "diagnosed mental disorder" is not fully defined under the Act, such condition is stated to "include[] a congenital or acquired condition affecting the emotional or volitional capacity that predisposes the person to the commission of criminal sexual acts in a degree constituting the person a menace to the health and safety of others." (§ 6600, subd. (c).)

Act. (§ 6601, subds. (a)(1), (b), (c) & (d).) When the evaluation reveals the inmate has suffered the required qualifying prior convictions (§§ 6600, subd. (a), (b), 6600.1) and two licensed psychologists and/or psychiatrists agree the inmate "has a diagnosed mental disorder such that he or she is likely to engage in acts of sexual violence without appropriate treatment and custody," the DMH transmits a request for a petition for commitment under the Act to the county in which the alleged SVP was last convicted, with copies of the evaluation reports and other supporting documents. (§ 6601, subds. (d), (h) & (i).) If a designated county's attorney concurs in the request, a petition for commitment is filed in that county's superior court. (§ 6601, subd. (i).)

Once filed, the superior court holds a hearing to determine whether there is "probable cause" to believe that the individual named in the petition is likely to engage in sexually violent predatory[5] criminal behavior upon his or her release. (§ 6602, as amended by Stats. 1996, ch. 4, § 4, and by Stats. 1998, ch. 19, § 3, ch. 961, § 4.) If such is found, the judge "shall" order that a trial be conducted "to determine whether the person

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[5] The Act defines "predatory" as "an act . . . directed toward a stranger, a person of casual acquaintance with whom no substantial relationship exists, or an individual with whom a relationship has been established or promoted for the primary purpose of victimization." (§ 6600, subd. (e).)

is, by reason of a diagnosed mental disorder, a danger to the health and safety of others in that the person is likely to engage in acts of sexual violence upon his or her release. . . ." (§ 6602, subd. (a).)

The person subject to a trial under the Act is to remain in custody in a secure facility until the trial is completed. (§ 6602, subd. (a).) That person is entitled to trial by jury, the assistance of counsel, the right to retain experts or professional persons to perform further evaluations, and access to relevant medical and psychological reports. (§ 6603, subd. (a).) The trier of fact must determine beyond a reasonable doubt whether the person named in the petition is in fact an SVP. (§ 6604.) If the person is determined to be an SVP, he or she shall be committed to the custody of the DMH for two years "for appropriate treatment and confinement in a secure facility . . . ," subject to annual review and extension of commitment if the diagnosed mental disorder and the consequent danger to the community persists. (§§ 6604, 6605.) "[T]he person shall not be kept in actual custody longer than two years unless a subsequent extended commitment is obtained from the court incident to the filing of a new petition for commitment under [the Act] . . . ." (§ 6604.)

Factual Summary

On August 7, 1984, a jury convicted Turner of forcible oral copulation and forcible oral copulation in concert (Pen. Code, § 288a, subds. (c) and (d)). For these sex crimes against the same victim, Turner was sentenced to prison for nine years. On January 23, 1985, a jury convicted Turner of forcible oral copulation, forcible oral copulation in concert and oral copulation in jail against two victims (Pen. Code, § 288a, subds. (c), (d) and (e)), and he was subsequently sentenced to prison for 16 years full strength consecutive to his earlier term.

On May 14, 1998, a petition was filed by the District Attorney of San Diego County alleging that Turner was an SVP under the Act. Based on the above convictions, determinate sentence and the reports of two psychiatric professionals who concurred, after separate evaluations, that Turner fit the Act's statutory qualifications, the People requested the superior court commence proceedings under the Act to determine whether Turner should be committed as an SVP. After finding probable cause Turner qualified under the Act as an SVP (§ 6602), the court set the matter for trial. A trial commenced December 4, 1998. On December 14, 1998, the court declared a mistrial after the jury reached a deadlock and set the matter for a new trial.

After the trial court denied Turner's motion to dismiss the petition under the Act, Turner filed a petition for writ of habeas corpus and a request for stay with this court which, after being read and considered, was denied without opinion. (See *In re James William Turner*, Feb. 25, 1999, D032916.)[6] The retrial to determine whether Turner was an SVP under the Act commenced on February 26, 1999.

At trial, the People presented the testimony of the two clinical psychologists, Drs. Gary Zinik and Hy Malinek, who had performed the earlier clinical evaluations[7] submitted with the petition. In addition to conducting the interviews, after reviewing Turner's police, probation, prison, court and medical records in light of the Diagnostic Statistical Manual of Mental Disorders, Fourth Edition (DSM-IV) used by those in the psychiatric field, both doctors diagnosed Turner as suffering from sexual sadism, a type of paraphilia,[8] from substance abuse

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[6] We have granted the parties' request to take judicial notice of our own file in the habeas proceeding. (Evid. Code, § 452.)

[7] Zinik had interviewed Turner on April 6, 1998. Malinek testified he had interviewed Turner on April 8, 1998, but his written report stated he did so on the 9th.

[8] Zinik also diagnosed Turner as suffering from paraphilia NOS, or paraphilia not otherwise specified. He explained he arrived at this diagnosis due to Turner's two types of sexual crimes, oral copulation with violence against nonconsenting White males and his less violent rapes against nonconsenting minority women.

in institutional remission[9] and antisocial personality disorder. Each also found Turner had previously committed two or more qualifying offenses under the Act. Each expert explained about his interview procedures, his "mental status exam" of Turner,[10] and his questioning of Turner about the predicate offenses as well as Turner's extensive criminal history.

Turner admitted to both experts he had committed the predicate offenses, and that he had orally copulated at least 20 boys while he was at California Youth Authority (CYA). Zinik related in detail the accounts Turner gave in the interview of his sexual assaults on male victims.[11] Turner told Zinik he was getting back at Whites for the way they had treated him in the

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[9] Zinik opined Turner suffered from alcohol and polysubstance abuse, and Malinek thought he suffered from opiod-heroin abuse.

[10] The result of the "mental status exam" showed that Turner did not have any signs of thought disorder, a psychosis or any problems with reality orientation.

[11] Turner admitted to Zinik that on April 25, 1984, while in the San Diego County Jail serving time on a gambling offense, as "tank commander" he assigned a new 23-year-old White male inmate to his cell and then together with another Black inmate called the young man "White cakes" and "White bitch" before climbing on the man's bunk, threatening and hitting him and finally forcing him to orally copulate Turner. The male victim vomited and required tranquilizers after Turner ejaculated in his mouth.

Turner also admitted that on both July 23 and 30, 1984, while in the courthouse holding tank of the San Diego County Jail, he committed additional sexual assaults against young White male inmates. In both cases, Turner grabbed and forced his erect penis into the victim's mouth until he ejaculated.

past and that he enjoyed humiliating and terrorizing them. He also told Zinik it was a sexual turn-on to force the boys, and then later the men in the jails, to do the things he required them to do. He further admitted there were several other victims in CYA and the jails that were never reported. Turner denied the three sexual assaults he had been charged with against women.[12]

Without going into the facts of the cases, Zinik also related that Turner acknowledged in the interview his long criminal history which showed he had been arrested 31 times by the time he turned 26 years of age for offenses showing some violence. Then relying on Turner's prison records and a report from one of Turner's experts which contained admissions by Turner, Zinik testified about Turner's additional crimes and rule violations committed while in prison, including one rule violation in July 1986 for indecent exposure where Turner had dropped his shorts, exposed his penis and waved it at a female prison guard in "a threatening manner." Zinik believed that

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[12] On cross-examination, Zinik conceded Turner had never been convicted of rape against a woman. However, he related that when he questioned Turner about one charged rape-in-concert case, Turner conceded he had had sex with the female victim, but claimed she consented to having sex with him and his two friends. When Turner was queried about another charged rape that was pled out to a false imprisonment conviction, Turner denied threatening the woman, wanting to have sex with her or trying to rape her and told Zinik he only kept her in his car and wouldn't let her out for a period of time.

Turner had showed no remorse for the things done to his victims and had smiled while he answered Zinik's questions about them.

Zinik opined Turner was a "complete psychopath" whose diagnosed mental disorders predisposed him to commit sexually violent crimes in the future. Zinik felt it was "just a matter of time before [Turner] commits some other sexual offense when he's released." Although Turner had had no reported sex offense since 1986, based on risk prediction factors/traits identified in various tests and studies,[13] Zinik opined Turner was more likely than not to reoffend sexually if released and thus met the criteria for commitment as an SVP.

Malinek, like Zinik, found Turner to be psychopathic, scored five on the RRASOR test and opined that because of his diagnosed mental disorders he was more likely than not to engage in future sexually violent behavior.[14] Malinek related that during his interview with him, Turner explained he "needed to

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[13] Zinik gave Turner the Hare Psychopathic Checklist (Hare) test, the Rapid Risk Assessment for Sexual Offense Recidivism (RRASOR) test and conducted an evaluation of the risk prediction factors identified in a study by Canadian researchers R. Karl Hanson and Monique T. Bussiere. Turner scored 39 out of 40 on the Hare and a 5 on the RRASOR, meaning he has a 48.8 percent chance of sexually reoffending within 5 years and 73.1 percent probability of doing so in 10 years.

[14] Malinek's opinion was based on Turner's past behavior, the fact his victims were males and strangers, his past offenses involved violence and anger, Turner's attitude of endorsing sexual violence and his score on the RRASOR.

'strike out at the system' . . . ." Concerning his sexual assault against one young White man in 1984, Turner told Malinek that "[t]here's a rage every day. I don't like White people. These are ways to vent my rage. Half of our [B]lack children are living below poverty. [I] couldn't get them [*sic*] White people so I got somebody that looked like them." Turner also claimed that during his CYA years, he had forced oral sex "every time he came in contact with White people." Like Zinik, Malinek found Turner unremorseful and proud of his earlier behavior. When Malinek asked Turner whether he would likely return to prison if released, Turner responded:

> I don't know. I would do what I have to do to live constructively. If I come to a situation where I may need money, I may commit a serious crime. I'm not somebody to sleep on a sidewalk bench. If the price is prison for the man I want to be, so be it. Hopefully I won't endeavor on crime. If I commit a crime, it wouldn't be a sexual crime; it would probably be more about getting some money.

In addition to Turner's testimony, a Muslim chaplain at Lancaster State Prison where Turner was last housed, and two psychiatric professionals testified in his defense. The Arabic Muslim chaplain testified Turner had been well respected in the prison Muslim community, one of only two inmates allowed to give sermons and supported his efforts against the racism of fellow Muslim inmates.

Forensic psychologist Shayna Gothard, who had been retained by the defense to do a "dangerousness assessment" of Turner, testified that after reviewing his records and interviewing him, she found his past crimes against White inmates had been primarily motivated by anger rather than sex. Although she agreed Turner suffered from antisocial personality disorder, she felt that he did not currently have a sexual disorder that would make him a danger to others and his substance abuse was in complete remission. Gothard related specific facts in the prison reports that showed Turner's violations in the past 13 years had become decreasingly aggressive and "increasingly sparse." She attributed the changes in his behavior to his conversion to Islam, his marriage, communication with his daughter, a greater appreciation of right and wrong and the consequences of any future criminal acts.

Dr. Theodore Donaldson, a clinical and forensic psychologist, also testified on Turner's behalf. Although he agreed Turner was a psychopath, after reviewing Turner's materials and interviewing him, he disagreed that Turner had any volitional impairment, that he suffered from sexual sadism or any other paraphilia or that there was any relationship between such diagnosis based on the DSM-IV and any prediction of reoffending sexually. Donaldson believed Turner's prior offenses were motivated by a desire for power and intimidation.

Based on Turner's recent major lifestyle changes and lack of criminal behavior or prison violations, Donaldson opined Turner was less likely to recommit than his RRASOR score suggested.

In Turner's testimony in his defense, he admitted he had committed the predicate crimes, the sex crimes at CYA, other nonsexual violent crimes and the various prison violations and crimes, including the sexual assault of the prison guard. Turner explained he had committed the sexual acts while in custody because of frustration, aggravation and rage toward Whites. He had just gotten caught up in the "predatory-type environment" and institutional violence.

While denying he had committed any rapes on female victims, Turner conceded he had been with other friends who raped a woman when he was 15 years old. As to the other charged rapes in his history, Turner explained that one had been for the alleged rape of a friend's prostitute whom he only had consenting sex with, and the other had involved the mother-in-law of a boy he had known in CYA who approached him, got in his car, drank and did "stuff" with him before he dropped her off at her boyfriend's house. Turner assumed the woman had reported he raped her because of his feud with her son-in-law.

Turner testified about his conversion to Islam, claiming "I consider Islam to be my health treatment." Because of such religion, he stopped smoking, doing drugs and committing any

further sexual acts in prison. Turner stated he was in constant contact with his daughter and plans to work and participate in the Muslim community when he is released.

On cross-examination, Turner conceded he had continued to commit violent acts in prison even after his conversion to Islam, and that he has four other children with whom he has had no contact since his incarceration. He further claimed his sexual assault on the female prison guard had been merely a "macho statement."

After considering all the trial evidence, the jury returned a verdict finding Turner an SVP.

DISCUSSION

I

Motion to Dismiss

Before the second trial in this matter, Turner brought a motion to dismiss on grounds section 6604 mandated his immediate release on parole because the jury was unable to agree on a verdict or finding he was an SVP beyond a reasonable doubt. Turner argued the plain language of the second sentence of section 6604 provides that if there is no requisite finding beyond a reasonable doubt then there is an automatic acquittal. The People responded the motion was untimely and because the totality of the language of section 6604 required the jury to find beyond a reasonable doubt before making a determination, a

mistrial is not a verdict. The People also pointed out that the first jury had reached a deadlock of 10 for finding the petition true.[15] After considering the matter, the trial judge denied the motion.

Afterwards, the court gave Turner time to bring a petition for writ of habeas corpus and a request for an immediate stay in this court, which we summarily denied. (*In re James William Turner*, *supra*, D032916.) The matter then proceeded with in limine motions and trial.

On appeal, Turner contends the trial court's interpretation of section 6604 calls the constitutionality of the Act into question because it would impermissibly allow "the State to hold indefinitely . . . any convicted criminal, even though he has completed his prison term." (*Foucha* v. *Louisiana* (1992) 504 U.S. 71, 82-83.) He argues section 6604 is ambiguous, subject to two interpretations, and therefore should be construed to prevent successive trials where, as here, the trier of fact cannot make a finding beyond a reasonable doubt that a person is

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[15] The clerk's transcript reflects the jury was deadlocked 10 for finding the petition true, 1 for finding the petition not true and 1 abstencia.

an SVP. Turner thus asserts the section as worded bars retrial.[16] We disagree.

We review the pertinent section of the Act under well established rules of statutory construction which require us "to ascertain the intent of the lawmakers so as to effectuate the purpose of the [statute.] [Citations.]" (*People* v. *Pieters* (1991) 52 Cal.3d 894, 898; see also *People* v. *Superior Court (Johannes)* (1999) 70 Cal.App.4th 560, 564.) To do so, we examine the relevant language of the statute and "accord words their usual, ordinary, and common sense meaning based on the language . . . used and the evident purpose for which the statute was adopted." (*In re Rojas* (1979) 23 Cal.3d 152, 155.) In interpreting any particular provision of a statute, we do not insert words into it as such would "violate the cardinal rule that courts may not add provisions to a statute. [Citations.]"

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[16] Turner correctly notes that the People's claim he is estopped from raising this issue on appeal because this court had already denied it after "reading and considering" his earlier petition for writ of habeas corpus, is contrary to established California law. (*People* v. *Medina* (1972) 6 Cal.3d 484, 493, disapproved of on other grounds in *Kowis* v. *Howard* (1992) 3 Cal.4th 888, 896-899.) As the court in *People* v. *Allison* (1988) 202 Cal.App.3d 1084, relying on *Medina, supra*, stated: "[W]e denied the People's petition . . . without opinion and as an act of discretionary denial. That appellate order does not conclusively evidence that denial was upon the merits and so, it neither bars nor governs this decision. [Citations.]" (*People* v. *Allison, supra*, 202 Cal.App.3d at p. 1088.)

(*Adoption of Kelsey S*. (1992) 1 Cal.4th 816, 827.) Nor are we permitted to rewrite the statute to conform to an assumed intent that does not appear from its plain language. (*Napa Valley Wine Train, Inc.* v. *Public Utilities Com.* (1990) 50 Cal.3d 370, 381.) We presume the Legislature in enacting a law "is deemed to be aware of statutes and judicial decisions already in effect and to have enacted the new in light thereof." (*People* v. *Hernandez* (1988) 46 Cal.3d 194, 201, disapproved of on another point in *People* v. *King* (1993) 5 Cal.4th 59, 78, fn. 5.) "[W]e do not construe statutes in isolation, but rather read every statute 'with reference to the entire scheme of law of which it is part so that the whole may be harmonized and retain effectiveness.' [Citation.]" (*People* v. *Pieters*, *supra*, 52 Cal.3d at p. 899.)

With these rules in mind, we turn to the pertinent language of the Act in question. Section 6604 of the Act is entitled "**Burden of proof; commitment for treatment; term; facilities**" and provides in pertinent part that:

> The court or jury shall determine whether, beyond a reasonable doubt, the person is [an SVP]. If the court or jury is not satisfied beyond a reasonable doubt that the person is [an SVP], the court shall direct that the person be released at the conclusion of the term for which he or she was initially sentenced, or that the person be unconditionally released at the end of parole, whichever is applicable. If the court or jury determines that the person is [an SVP], the person shall be committed for two years to the custody of the [DMH] for appropriate treatment and confinement in a secure facility designated by the Director of [the DMH], and the person

> shall not be kept in actual custody longer than two years unless a subsequent extended commitment is obtained from the court incident to the filing of a new petition for commitment. . . .

By its plain language, section 6604, among other things, sets forth the burden of proof required for making a "finding" that a person is an SVP under the Act. Our Supreme Court has long held that such beyond a reasonable doubt burden of proof is required in civil commitment proceedings because "the interests involved in [such] proceedings are no less fundamental than those in criminal proceedings and that liberty is no less precious because forfeited in a civil proceeding than when taken as a consequence of a criminal conviction." (*In re Gary W.* (1971) 5 Cal.3d 296, 307.) It has also held that for the same reasons, a person subject to such proceedings is entitled to a unanimous verdict rather than the usual three-fourths agreement for a regular civil verdict. (*People* v. *Feagley* (1975) 14 Cal.3d 338, 351.) This requirement is codified in section 6603, subdivision (d) of the Act which specifically provides that "[a] unanimous *verdict* shall be required in any jury trial." (Italics added.) Subdivision (e) of section 6603 further provides that "[t]he court shall notify the [DMH] of the *outcome* of the trial by forwarding to the department a copy of the minute order of the court within 72 hours of the *decision*." (Italics added.)

When the unanimity and finality requirements of section 6603 are read together with the burden set forth in section 6604, they provide, as the trial court correctly noted, that only if a jury makes a final unanimous finding, verdict, outcome or decision the People failed to meet the required burden beyond a reasonable doubt, is the alleged SVP to be released. We therefore believe the only reasonable construction of section 6604 is that it requires the jury or court to make a "finding," or render a verdict or decision, it is satisfied beyond a reasonable doubt the alleged person is either an SVP or there are doubts whether he is an SVP. To hold such section to bar retrial if no finding or verdict can be made either way, as Turner would have us do, would thwart the purpose of the Act to protect the public from "a small but extremely dangerous group of [SVP's] that have diagnosable mental disorders . . . identified while they are incarcerated." (Stat. 1995, chs. 762 & 763, § 1, Historical and Statutory Notes, § 6600.) By enacting the Act, the Legislature intended to confine and treat such identified individuals "until such time that it can be determined that they no longer present a threat to society." (*Ibid.*) Our Supreme Court has found such civil commitment scheme constitutional because it ensures that the SVP does not "'remain confined any longer than he suffers from a mental abnormality rendering him unable to control his dangerousness'

[(Citation), and the SVP] is entitled to unconditional release and discharge if he prevails in [a] proceeding [under the Act]. [Citation.]" (*Hubbart, supra*, 19 Cal.4th at p. 1177.)

Although the Act does not specifically provide for retrial if there is a hung or deadlocked jury, as the trial court properly found, such is implied when all sentences of section 6604 are considered with the Act's "finality" requirement that the jury finding be unanimously determined beyond a reasonable doubt. As the People note, if there is not a final determination, true finding or verdict in a civil case under the appropriate burden of proof, the action may be tried again as the court may direct. (Code Civ. Proc., § 616.)[17] We presume the Legislature was well aware of both this long-standing civil statutory provision permitting retrial where a jury deadlock results in a mistrial and the application of the unanimity requirement of the beyond a reasonable doubt standard for civil jury trial commitments when it enacted the Act.

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[17] Code of Civil Procedure section 616 provides: "In all cases where the jury are discharged without having rendered a verdict, or are prevented from giving a verdict, by reason of accident or other cause, during the progress of the trial, or after the cause is submitted to them, except as provided in section 630, the action may be again tried immediately, or at a future time, as the court may direct." Code of Civil Procedure section 630 provides for a directed verdict under certain circumstances not pertinent here.

Turner construes the second sentence of section 6604 in a vacuum. To interpret that sentence alone as he does to bar retrial, we would have to ignore the entire civil commitment scheme of which it is a part and rewrite the section or insert words into it, which we cannot do. (*Adoption of Kelsey S., supra*, 1 Cal.4th at p. 827; *In re Rojas, supra*, 23 Cal.3d at p. 155.) Rather, our interpretation of the pertinent language of section 6604 is consistent with the rules of statutory construction (see *People* v. *Pieters, supra,* 52 Cal.3d at pp. 898-899) and comports with the Legislature's express intent that the Act provide protection for the public from identified SVPs.

Because we hold that section 6604 does not bar retrial if there is no unanimous jury "finding" beyond a reasonable doubt, we conclude the trial court properly granted a mistrial and denied Turner's motion to dismiss.

II

Sufficiency of the Evidence

In order to establish Turner was an SVP, the People needed to prove that (1) he had been convicted of two separate sexually violent offenses against two or more victims, (2) he had served a determinate term, (3) he had a diagnosable mental disorder, and (4) such disorder made him a danger to the health and safety of others in that it was likely he would engage in sexually violent conduct if released. (§ 6600, subd. (a).) On appeal,

Turner basically challenges the sufficiency of the evidence to support the last two elements. He essentially argues there was insufficient evidence to show he suffers from a diagnosed mental disorder that impairs his volition to the degree he is unable to control his behavior and also to show that he is likely to commit sexually violent crimes upon release. He therefore contends the finding he is an SVP must be reversed. We disagree.

As noted earlier, section 6600, subdivision (c) defines a "diagnosed mental disorder" as "a congenital or acquired condition affecting the emotional or volitional capacity that predisposes the person to the commission of criminal sexual acts in a degree constituting a menace to the health and safety of others." Case law interpreting this language has not stated any standard requiring a lack of total volitional control. Rather, in *Hubbart*, *supra,* our Supreme Court noted that because "due process *requires* an inability to control dangerous conduct, and does not restrict the manner in which the underlying impairment is statutorily defined" (*Hubbart, supra*, 19 Cal.4th at p. 1158, italics in original), the Act's diagnosed mental disorder requirement establishes the necessary connection between impaired volitional control and the danger posed to the public where the diagnosed mental disorder is characterized by an inability to control future behavior, such as pedophilia,

paraphilia and antisocial personality disorder. (*Ibid.*, citing *Kansas* v. *Hendricks* (1997) 521 U.S. 346, 358 *(Hendricks)*.)

Similarly, in upholding the constitutionality of the Kansas Sexually Violent Predators Act, which is much like the Act, the United States Supreme Court in *Hendricks, supra,* stated it required future dangerousness and a "mental abnormality" that "makes it difficult, if not impossible, for the person to control his dangerous behavior." (*Hendricks, supra*, 521 U.S. at p. 358.) "[P]ersons committed under the Act are . . . suffering from a 'mental abnormality' . . . that prevents them from exercising adequate control over their behavior." (*Id*. at p. 362.)

Moreover, both the United States and California Supreme Courts have held that past conduct is sufficient evidence to support a finding that a person is likely to commit sexually violent crimes in the future. In *Hendricks*, *supra*, the court noted, "The statute . . . requires evidence of past sexually violent behavior and a present mental condition that creates a likelihood of such conduct in the future. . . . As we have recognized, '[p]revious instances of violent behavior are an important indicator of future violent tendencies.'" (*Hendricks, supra*, 521 U.S. at pp. 357-358.) Our Supreme Court in *Hubbart, supra,* cited *Hendricks* when it rejected an argument that the use of past sexually violent acts to predict future dangerousness

was "inherently flawed[,]" commenting that "the United States Supreme Court has consistently upheld commitment schemes authorizing the use of prior dangerous behavior to establish . . . the likelihood of future harm." (*Hubbart, supra*, 19 Cal.4th at pp. 1163-1164.)

When we review the sufficiency of the evidence in light of the facts adduced at trial, applying the same standard used for reviewing the sufficiency of the evidence to support a criminal conviction (*People* v. *Mercer* (1999) 70 Cal.App.4th 463, 466), we conclude there is more than sufficient evidence that showed Turner's diagnosed mental impairment affected his volitional control and supported the finding he would likely reoffend upon release. Both of the People's experts opined, based on the record available to them and on their interviews with Turner, that his volitional and emotional capacity was impaired to some degree when he committed his earlier offenses. Although both experts explained that Turner's acts revealed some control and planning, they noted he exhibited the inability to resist sexual deviant impulses and engaged in the same violent sexual behavior again and again with no emotion and without regard for the consequences. Both opined that Turner's various paraphilias, including sexual sadism and his antisocial personality disorder, made him more likely than not to commit criminally violent sex acts in the future. Although Turner and his experts disagreed

at trial that Turner suffered from a mental condition that affected his volition or control to commit violent sexual acts, insisting instead that his earlier violent criminal behavior was based on rage against White inmates and not on sexual deviancy, their credibility and conclusions were matters resolved against Turner by the jury. On appeal, we do not reweigh or reinterpret the evidence, but merely decide whether the record contains sufficient evidence to support the determination below. (*People* v. *Mercer, supra*, 70 Cal.App.4th at pp. 466-467.)

Here, we find the jury could have reasonably believed the People's witnesses and rejected Turner's testimony and that of his experts. Contrary to Turner's assertions the evidence only showed that his psychopathy, which is not a diagnosable disorder under the DSM-IV, made him incapable of emotions for his victims, that his repeat behavior and poor behavioral choices showed no volitional impairment, and that his high probability of reoffending violently did not show he would reoffend sexually, such challenges against the People's experts' evidence were presented to and rejected by the jury. The jury was also instructed on expert witness qualifications and testimony and on the proper burden of proof for finding Turner an SVP. The jury chose to believe the People's experts. Our review of the record finds substantial evidence supports the jury's determination Turner would likely commit sexually violent crimes upon release.

We, therefore, conclude that sufficient evidence exists in the record from which a rational trier of fact could determine both that Turner suffered from a mental disorder that affected his emotional and volitional control, and that he would likely reoffend sexually if released. Sufficient evidence supports the jury's finding Turner is an SVP.

III

Other "Bad Acts" Evidence

In limine, Turner's counsel asked the court to limit the extent of the hearsay that would be admitted in evidence via the testimony of the experts. Counsel conceded the underlying facts of the predicate crimes were relevant for the experts' opinions and acknowledged that case law has interpreted the Act to provide an exception to the hearsay rule with respect to the predicate crimes. However, counsel objected on hearsay grounds to the experts referring to any of the factual matters about various rape charges in Turner's history which did not result in convictions because he had pled to false imprisonment in those cases.

In response, the People noted that Turner had talked to all the "shrinks" about those cases and in particular had explained about one charge that "this woman was raped, and he was there, but he didn't really participate in it." The People further argued that because Turner's defense to the SVP petition

appeared to be that he only rapes White men in custody as an act of violence, not as a sexual act, the facts of the other rapes would be relevant to show he had also committed acts of sexual violence against women when he was not incarcerated.

Turner's counsel clarified he was specifically objecting on hearsay grounds to the underlying facts of the two adult convictions of false imprisonment which contained rape allegations that were subsequently dismissed and not to the facts of a juvenile conviction where Turner might have been an aider and abettor in a rape.

The court reviewed the Act in light of the objections, and ruled it would allow the People's experts to testify about the objected to evidence if a foundation was laid that they relied on such in formulating their impressions and opinions for this case. The court reasoned that because the Legislature "[made] the statute exceptionally broad and exceptionally general in terms of what the experts can use in formulating their opinion and what the trier of fact, the jury, can hear in determining whether or not [a person is or remains an SVP,]" it was going to allow such hearsay evidence over the defense objection.

Later, during Zinik's testimony, when the questioning turned to the facts underlying the charged rapes in Turner's criminal history, defense counsel requested the court, at sidebar, admonish the jury as to the expert's testimony that was

taken from police and probation reports concerning crimes other than the predicate offenses. The court agreed and told the jury the following:

> Ladies and Gentlemen, counsel have raised an interesting point, and it's one thing I want to address because it's going to happen with every single expert that comes in, not just this doctor. Each of these doctors that are going to come in and testify will have reviewed a lot of different material. Some of that material will include statements made by persons who will never show up in this courtroom. It is basically for you to decide the value of the opinion of the doctor based on this totality of a review. [¶] What I want to caution you with is that all of the statements made by persons who are not here is not necessarily the truth. I mean we don't know that. We're not litigating that. Where it's relevant for the thirteen of you is the fact that the doctor has read those statements and they in part sort of lay the foundation for his over-all opinion. [¶] So all I want to caution you is that you're going to hear about statements that are contained in reports, in transcripts, and so forth. And it's not necessarily for the truth of what was said by these people, but it's very relevant on the impact it has in formulating the doctor's opinion. So just keep that in mind, and you will find that this will permeate through all of the experts you hear. They all did the very same thing, which is the way they're supposed to do it, but I just wanted to bring that to your attention.

As noted in the factual summary above, Zinik and the other experts subsequently testified about questioning Turner on his criminal history and the hearsay statements of some of his victims contained in the various records. The experts relied on the contents of Turner's records, in addition to their

interviews with him, in forming their respective opinions regarding his mental disabilities and future dangerousness. Turner himself admitted in his trial testimony that he committed most of the crimes about which he was questioned by the experts during their respective evaluations. As to the rapes he denied, he explained his own version of the events involving the female victims, whom he said either consented to having sex with him or were making up stories about having sex with him.

On appeal, Turner contends the trial court erred in ruling any of the hearsay statements in his criminal history would be admissible in evidence for purposes of explaining the experts' opinions under a broad interpretation of the Act. At trial, however, Turner only objected to the admission into evidence of the hearsay concerning his adult charged, but not convicted, rapes. Thus, as to his overbroad objections on appeal to any conceivable hearsay evidence of other acts or crimes, i.e., earlier childhood crimes for fires, shoplifting, drug use, strong-armed robbery, later crimes of gambling, pimping, drug selling, various assaults in and out of prison, such are waived. Moreover, the record reflects that most of those additional arrests and charges mentioned by the experts now objected to were either conceded to by Turner in his various interviews with the experts or in his own trial testimony. Therefore, Turner

himself has verified through his adopted admissions the reliability of such hearsay in his records.

As noted earlier, Turner does not challenge the admission of hearsay evidence from his reports for proof of his qualifying prior convictions. He acknowledges that section 6600, subdivision (a)[18] allows the People to prove a proposed SVP's prior qualifying convictions by documentary evidence, including hearsay victim statements and evidence contained in probation reports. (*People* v. *Superior Court (Howard)* (1999) 70 Cal.App.4th 136; see also *In re Parker* (1998) 60 Cal.App.4th 1453, 1467.) He also concedes such evidence is admissible as relevant for showing the factual bases for the experts' opinions concerning those predicate offenses in proceedings under the Act. Rather, Turner asserts such so-called statutory hearsay exception does not cover the admission of hearsay evidence of prior bad acts or convictions other than that relating to the predicate offenses. However, we need not now determine such issue because even assuming error in the admission of the

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[18] Subdivision (a) of section 6600 provides in pertinent part that: "[t]he existence of any prior convictions may be shown with documentary evidence. The details underlying the commission of an offense that led to a prior conviction, including a predatory relationship with the victim, may be shown by documentary evidence, including, but not limited to, preliminary hearing transcripts, probation and sentencing reports, and evaluations by the [DMH]."

hearsay evidence concerning the facts of Turner's earlier charged rapes, such error was harmless on this record.

As our Supreme Court has noted:

> An expert may generally base his opinion on any "matter" known to him, including hearsay not otherwise admissible, which may "reasonably . . . be relied upon" for that purpose. [Citations.] On direct examination, the expert may explain the reasons for his opinions, including the matters he considered in forming them. However, prejudice may arise if, "'under the guise of reasons,'" the expert's detailed explanation "'[brings] before the jury incompetent hearsay evidence.'" [Citations.] [¶] Because an expert's need to consider extrajudicial matters, and a jury's need for information sufficient to evaluate an expert opinion, may conflict with an accused's interest in avoiding substantive use of unreliable hearsay, disputes in this area must generally be left to the trial court's sound judgment. [Citations.] Most often, hearsay problems will be cured by an instruction that matters admitted through an expert go only to the basis of his opinion and should not be considered for their truth. [Citation.]

(*People* v. *Montiel* (1993) 5 Cal.4th 877, 918-919.)

Here, the trial court gave a limiting instruction during the testimony of the People's first expert that the jury should not consider the hearsay matters testified to by that expert or by the other experts as true, but to only consider such matters for the bases of the experts' opinions in this case. While such a limiting instruction may not always be enough to cure prejudice in the admission of hearsay matters (see *People* v. *Coleman* (1985) 38 Cal.3d 69, 91-93), Turner's counsel did not

request the court to further consider the matter regarding the facts of the unconvicted rapes under Evidence Code section 352. Instead, the record reflects that each expert in turn relied upon his or her choice of hearsay statements or portions of the reports in Turner's criminal history without objection on prejudicial grounds and that Turner replied to questions regarding such hearsay matters in his own testimony. None of these hearsay statements were admitted into evidence in documentary form. Although the People did refer to some of the hearsay matters in closing arguments, the court instructed the jury again about the limited use of such evidence and about the use of expert testimony as well as to the fact that the attorneys' arguments were not evidence.

In addition, the jury had before it all the facts of Turner's predicate offenses, his admitted other sexual acts against boys and men in CYA, jail and prison, the facts of his conceded juvenile gang-rape of a teenage girl, his other criminal behavior throughout his lengthy criminal history and his admitted violent acts and violations in prison, which included his sexual assault against one female prison guard. Under these circumstances, we can find no prejudice in the admission of the hearsay matters in the People's experts' testimony concerning Turner's prior charged adult rapes.

Moreover, we can find no violation of Turner's due process rights to cross-examine and confront witnesses in the admission of such hearsay statements and evidence. (See *Hendricks*, *supra*, 521 U.S. 346, 353, 364; *Hubbart, supra*, 19 Cal.4th at pp. 1174-1175, fn. 33; *In re Malinda S.* (1990) 51 Cal.3d 368, 383, fn. 16). Turner was able to fully contest the reports upon which the evaluations of the experts were based, to cross-examine them on the basis of the information used and to present conflicting testimony of his own.[19] (§ 6603.) As such, his right to engage in cross-examination and to present evidence were not effectively emasculated. (See *Delaware* v. *Fensterer* (1985) 474 U.S. 15, 19.)

Although the underlying reliability of the women victims of the prior sexually violent rapes may have remained untested, Turner had the opportunity to evaluate and cross-examine the testimony of the qualified experts who had reviewed the womens'

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[19] In determining the nature and extent of due process protections due a civil litigant like Turner, we have considered: (1) the private interest that will be affected by the official action, (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards, (3) the interest in enabling individuals to thoroughly present their side of the story, and (4) the governmental interests, including the function involved and the fiscal and administrative burdens that additional or substitute procedural requirements would entail. (*In re Malinda S., supra*, 51 Cal.3d at p. 383.)

statements regarding the earlier rapes contained in the probation report and preliminary hearing transcripts. (See *Whitman* v. *Superior Court,* 54 Cal.3d 1063, 1077-1078.) Even though his interest in facing lengthy confinement for treatment as an SVP is great, the People also have a strong interest in protecting the public from persons like Turner who are sexually dangerous to others. (See *Hubbart, supra*, 19 Cal.4th at p. 1151.) In sum, no prejudicial error is shown in the court's ruling the hearsay contained in Turner's reports was admissible to explain the experts' diagnoses and opinions of future sexual dangerousness for purposes of the Act.

IV

Daughter's Proposed Testimony

Turner also contends the trial court prejudicially erred when it refused to allow his 16-year-old daughter to testify in his defense thereby denying him his constitutional right to a fair trial. We disagree.

Generally, a trial court has wide discretion in determining the admissibility of evidence (*People* v. *Lucas* (1995) 12 Cal.4th 415, 449), i.e., in deciding whether the evidence is relevant (*People* v. *Green* (1980) 27 Cal.3d 1, 19, disapproved of on other grounds in *People* v. *Hall* (1986) 41 Cal.3d 826, 834, fn. 3, and in *People* v. *Martinez* (1999) 20 Cal.4th 225, 232-241) and whether Evidence Code section 352 precludes its admission

(*People* v. *Lucas*, *supra*, 12 Cal.4th at p. 449). The trial court's ruling in exercising such discretion will not be disturbed on appeal absent an abuse of discretion. (*Ibid*.)

Here, the record reflects that when the People objected to the defense proposal to call Turner's daughter as a witness, the court asked for an offer of proof. Counsel offered that her testimony would be relevant to counter the People's experts' testimony showing Turner's lack of feelings or emotional connection with his victims and to show his likely behavior when he is released, i.e., that he intended to be a father to his daughter and to support her. The People objected to the proof on grounds the daughter's testimony would have no relevance as to Turner's insight into his crimes or his future dangerousness, and that it would be highly prejudicial in invoking the sympathies of the jurors by pleading to send her Daddy home. The court sustained the objection to such testimony, stating:

> We have a basic problem here, . . . , everybody, including [defense expert] witnesses, agree [Turner] is a psychopath. The only way that the daughter can testify about how great a father he's going to be and all of his concerns are from what he has expressed. That's not relevant. . . to any issue here. [¶] And number two, he can testify as to all of this plethora of things that the doctors have said about him. Some good and . . . I'm not sure where the some good is, but mostly bad. But I'm not going to bring a sixteen-year-old in here to say, yeah, this is my Dad; I have been visiting him for X number of years. He appears to me to love me. He appears to . . . want to take care of me. That's for the sympathy, passion, prejudice side of all of this,

> and I'm not going to allow it. [¶] I don't see any relevance whatsoever in her testifying. So we'll note that you would have called her, that you have her either under subpoena or have her available to testify, and that the court is specifically excluding her from testifying.

After Turner's own testimony, the court again denied his renewed motion to call his daughter as a witness based on the same reasons.

On this record, which reflects the court understood and performed its duty to determine the relevancy of the proffered testimony and to weigh the possibility of prejudice against any possible probative value of such, we cannot say the trial court abused its discretion in determining such matters. (See *People* v. *Williams* (1997) 16 Cal.4th 153, 213-214.) Contrary to Turner's attempt to portray the court's evidentiary rulings as involving federal constitutional rights, the right to a fair trial is only implicated where the evidence at issue is "relevant evidence of *significant* probative value to the defense." (*People* v. *Reeder* (1978) 82 Cal.App.3d 543, 553.) Generally, evidence that is marginal or which produces only speculative inferences, such as that offered, lacks significant probative value. (*People* v. *Milner* (1988) 45 Cal.3d 227, 240, fn. 11.) Thus, as the trial court correctly noted, Turner's daughter's proposed testimony would have been totally irrelevant to the issues at trial. Moreover, such testimony would have been speculative as to what Turner's feelings and intentions

upon his release were and cumulative of his own testimony.[20] Under these circumstances, we conclude there was no abuse of discretion in the trial court's ruling sustaining the People's objections to the admission of the proffered evidence.

V

"Likely" To Commit Sexually Violent Acts

In limine, the court denied without prejudice Turner's request to add to CALJIC No. 4.19 a definition of "likely" to mean "more likely than not" with reference to whether he would be likely to reoffend. The court noted it had thoroughly considered the matter in light of the Act and found it covered all statutory bases in this clouded area of the law. Later, during a discussion of proposed instructions, the court again noted and denied Turner's request to modify CALJIC No. 4.19 to define "likely" as "more likely than not." The court subsequently read CALJIC No. 4.19 to the jury, which tracked the language of the Act (§ 6600) and specifically set forth the beyond the reasonable doubt standard of proof required in order to find whether Turner was likely to engage in sexually violent

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[20] Such would also have been cumulative to the testimony of defense expert Gothard, who testified that Turner told her during her interview with him that he regretted missing out on his daughter's life, but that she had regularly visited him at prison. Gothard opined Turner was motivated to stay out of jail so he could see his daughter.

criminal behavior or reoffend. The jury did not request any definition of the term "likely" before rendering a verdict.

On appeal, Turner claims the trial court's refusal to define "likely" as requested impermissibly lessened the People's burden of proving he would likely reoffend. We disagree.

While at first blush, the wording of CALJIC No. 4.19 may appear a bit confusing, it still requires the jury to find beyond a reasonable doubt that the proposed SVP is "likely to engage in sexually violent criminal behavior." Turner simply fails to appreciate that the court as well as his counsel stressed that the jury's ultimate finding he is an SVP must be found beyond a reasonable doubt. (§ 6604.) Such ultimate finding necessarily means that all of the requirements for an SVP, including the requisite finding that the alleged person "is likely to engage in sexually violent behavior," have been established beyond a reasonable doubt. (See *Hubbart, supra*, 19 Cal.4th at p. 1147.) Such standard has passed constitutional muster. (See *id.* at p. 1163 & fn. 26; see also *Hendricks, supra,* 521 U.S. at p. 358.) Moreover, both the courts in *Hendricks* (*Hendricks, supra*, 521 U.S. at p. 358) and *Hubbart* (*Hubbart, supra*, 19 Cal.4th at p. 1163 & fn. 26) have rejected contentions that a "likely to engage in sexually violent behavior" standard violates due process because it is too low to justify an involuntary civil commitment.

In light of the totality of the given instructions and our review of the entire record (see *Estelle* v. *McGuire* (1991) 502 U.S. 62, 72; *People* v. *Cain* (1995) 10 Cal.4th 1, 36), we do not believe there is a reasonable likelihood that the jury understood the complained of instruction as permitting a finding Turner is an SVP on a standard less than beyond a reasonable doubt. As noted earlier, the court instructed the jury on the reasonable doubt standard involved in these proceedings. In addition, the jury was told that "[i]f after a consideration of all the evidence you have a reasonable doubt that the respondent is [an SVP], you must find that he is not [an SVP] and that the allegation . . . is untrue." Within CALJIC No. 4.19, the jury was told that the burden of proving that Turner is an SVP is "beyond a reasonable doubt." Assuming as we must "that the jurors are intelligent beings and capable of understanding and correlating all instructions which are given to them" (*People* v. *Billings* (1981) 124 Cal.App.3d 422, 428, disapproved of on other grounds in *People* v. *Karis* (1988) 46 Cal.3d 612, 642, fn. 22), we think the jury was fully capable of separating the criteria of the "likely" commission of future sexually violent acts from the standard of proof of beyond a reasonable doubt. Turner has failed to show CALJIC No. 4.19, as given in this case, permits the element of likely future criminal conduct to be proved by a standard less than beyond a reasonable doubt.

Further, because both of the People's experts found Turner was more likely than not to reoffend, Turner would have difficulty showing that the result would be any different had his proposed instruction been given in this case. No instructional or due process violation has been shown regarding the term "likely."

DISPOSITION

The judgment is affirmed.

CERTIFIED FOR PARTIAL PUBLICATION

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HUFFMAN, J.

WE CONCUR:

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KREMER, P.J.

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NARES, J.